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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

VERNON MOUTON, Plaintiff and Appellant, v. DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES, Defendant and Respondent.	A111617 (San Francisco County Super. Ct. No. 504074)

Plaintiff Vernon Mouton's (Mouton) driver's license was suspended by the Department of Motor Vehicles (DMV). The circumstances leading to that suspension are described by the arresting officer's report: Shortly after midnight on August 30, 2003, "I observed the driver pull into a public parking lot and get out of his vehicle. The driver walked away from his vehicle and began to urinate on the sidewalk. I made contact with the driver and smelled an odor of an alcoholic beverage coming from his person." The officer also noticed that the driver's "speech was slow and slurred," and "his eyes were red and watery." Mouton failed field sobriety tests and was arrested for driving while intoxicated. (Veh. Code, § 23152, subd. (a).) After being transported to jail, Mouton refused to be tested for blood alcohol content. The officer filled out a "Chemical Test Refusal" form, which recited the consequences of refusing to take a test. The form also records Mouton's reply: "RESPONSE TO: Will you take a Breath test? NA Blood test? DON'T WANT TO ."

By reason of his refusal, Mouton's license to drive was suspended for one year (see Veh. Code, §§ 13353, 23612, subds. (a)(1)(D) & (e)) by an administrative hearing officer for the DMV. Mouton petitioned for a writ of administrative mandamus pursuant to Code of Civil Procedure section 1094.5 The trial court denied the petition, and Mouton appeals.

DISCUSSION

Judicial review of an administrative suspension or revocation of a driving license by DMV is subject to well established rules. "In ruling on an application for a writ of mandate following an order of suspension or revocation, a trial court is required to determine, based on its independent judgment, ' "whether the weight of the evidence supported its administrative decision." ' [Citations.]." (*Lake v. Reed* (1997) 16 Cal.4th 448, 456-457.) Although the trial court exercises its independent judgment, it does so while affording a strong presumption of correctness to the DMV's administrative decision, and the person challenging that decision must carry the burden of convincing the court that the decision is contrary to the weight of the evidence. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817; see *Manriquez v. Gourley* (2003) 105 Cal.App.4th 1227, 1233.)

When, as here, the trial court denies the petition, and that decision is challenged on appeal, the reviewing court " 'need only review the record to determine whether the trial court's findings are supported by substantial evidence.' [Citation.] ' "We must resolve all evidentiary conflicts and draw all legitimate inferences in favor of the trial court's decision. [Citations.] Where the evidence supports more than one inference, we may not substitute our deductions for the trial court's. [Citation.] We may overturn the trial court's factual findings only if the evidence before the trial court is insufficient as a matter of law to sustain those findings." ' [Citations.]" (*Lake v. Reed*, *supra*, 16 Cal.4th 448, 457; see *Morgenstern v. Department of Motor Vehicles* (2003) 111 Cal.App.4th 366, 372.) As we noted in *Poland v. Department of Motor Vehicles* (1995) 34 Cal.App.4th 1128, 1138-1139: "It is not for us to determine whether the evidence 'preponderated' on

one side or the other, but only whether substantial evidence supported the ruling of the [trial court]."

Although it has not been compromised, our review has been complicated by the extremely scanty record before us. Our review, like that of the trial court, is ordinarily confined to the administrative record, that is, only those materials produced during the administrative proceeding conducted by DMV. (E.g., *Saleeby v. State Bar* (1985) 39 Cal.3d 547, 562, fn. 5; *Cooper v. Kizer* (1991) 230 Cal.App.3d 1291, 1300; Cal. Administrative Mandamus (Cont.Ed.Bar 3d ed. 2003) § 14.2, p. 511.) "The petitioner has the burden of producing a sufficient administrative record to show the error by the agency. . . . If . . . the petitioner fails to . . . file a sufficient record with the reviewing court, the court may deny the writ. If the petitioner fails to file a sufficient record to show error, the presumption of regularity will prevail and the petition will be denied." (Cal. Administrative Mandamus, *supra*, § 4.11A, pp. 114.3-114.4.) "The DMV is not required to show it was right. It was up to [Mouton] to supply a sufficient record to show the DMV was wrong." (*Elizabeth D. v. Zolin* (1993) 21 Cal.App.4th 347, 355.)

Mouton has not done so. All he has produced is four "exhibits" appended to his opening brief. Those "exhibits" are: (1) the arresting officer's report of the incident on a DMV form; (2) a "Chemical Test Refusal" form completed by the arresting officer; (3) the arresting officer's report of the incident on a California Highway Patrol form; and (4) a "Narrative Supplemental" form by the arresting officer describing the incident, which appears to have been filed with the San Mateo County Sheriff. There is nothing evidencing the actual administrative decision Mouton sought to overturn, or any findings made by the administrative hearing officer.

The Attorney General, representing the DMV, advises that these are "true copies of the salient documentary exhibits introduced into evidence at the administrative hearing on this matter." And the trial court made an apparent reference to the administrative record as being only 14 pages.

Aggravating the vacuum in the record is the absence of Mouton's petition specifying the grounds on which he asked the trial court to quash the administrative

decision. Without it, we do not know whether Mouton claimed that the administrative findings—if any were in fact made by the administrative hearing officer—are not supported by substantial evidence, or whether the hearing officer acted in excess of jurisdiction, or whether Mouton did not receive a fair trial, or whether there was a prejudicial abuse of discretion (Code Civ. Proc., § 1094.5, subds. (b) & (c)), or all of the above. However, from a comment made by the trial court, it appears that Mouton was contesting the sufficiency of the evidence, as well as whether there was probable cause to arrest him.

Such an inadequate record could allow us to refuse to consider these issues. (See *Elizabeth D. v. Zolin*, *supra*, 21 Cal.App.4th 347, 354 [" '[I]n the absence of an evidentiary record, sufficiency of the evidence is not an issue open to question.' "].) We choose not to so proceed, and conclude that the record before us is, however barely, sufficient to decide the issues presented by Mouton on this appeal.

Mouton first contends that there was insufficient evidence that he "refused to submit to a chemical test" to test his blood alcohol content. His argument is founded on the supposed ambiguity of his reported response—"NA"—to the arresting officer's question "Will you take a Breath test?" Mouton asserts that "NA" could be an abbreviation for "Not Applicable," and should not be construed as the negative "Nah." This issue is, at best, one of conflicting conclusions or inferences. The one drawn by the hearing officer, and by the trial court, must be accepted on this appeal. (*Lake v. Reed*, *supra*, 16 Cal.4th 448, 457; see *Morgenstern v. Department of Motor Vehicles*, *supra*, 111 Cal.App.4th 366, 372; *Safirstein v. Nunes* (1966) 241 Cal.App.2d 416, 421; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 370, pp. 420-421.)

Mouton also points to an unchecked box on one of the forms completed by the arresting officer showing that the suspect "refused" to take a breath test, as casting doubt on the officer's conclusion that Mouton declined that test. This is simply a conflict in the evidence that, again, has been, and must be here, resolved against Mouton. (*Lake v. Reed*, *supra*, 16 Cal.4th 448, 457.) We do note, to support the conclusion accepted by the

hearing officer, and the trial court, that on the DMV form completed by the arresting officer, he did check the "Chemical Test Refusal" box.

None of the four cases cited by Mouton in his August 2, 2006 letter "re Additional Cases cited after Briefing"—*Maxsted v. Department of Motor Vehicles* (1971) 14 Cal.App.3d 982; *Cahall v. Department of Motor Vehicles* (1971) 16 Cal.App.3d 491; *Buchanan v. Department of Motor Vehicles* (1979) 100 Cal.App.3d 293; and *Barrie v. Alexis* (1984) 151 Cal.App.3d 1157—supports a different result. It is perhaps enough to note that all four cases held against the petitioners, including three (*Maxsted, Buchanan* and *Barrie*) which reversed trial court holdings for them. Perhaps most significantly, *Cahall* held that whether there was a refusal to take a test was a "question of fact." (*Cahall, supra,* at p. 497.) That question of fact was determined adversely to Mouton.

In making these arguments, Mouton intimates that he was somehow deprived by the DMV of the opportunity to "cross-examine the reporting officer" at the hearing before the trial court. The short answer to this issue has already been provided—the record in this case was limited to the administrative record before the hearing officer. (*Saleeby v. State Bar*, *supra*, 39 Cal.3d 547, 562, fn. 5; Cal. Administrative Mandamus, *supra*, § 14.2, p. 511.) The statute governing administrative mandamus does make limited allowance for augmentation of the administrative record (see Code Civ. Proc., § 1094.5, subd. (e) [court may admit "relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded at the hearing"]), but it was up to Mouton to bring new information from the officer before the trial court. (See Cal. Administrative Mandamus, *supra*, § 4.12, p. 114.4.) As previously noted, this burden was on Mouton, not the DMV. (*Fukuda v. City of Angels*, *supra*, 20 Cal.4th 805, 817; *Elizabeth D. v. Zolin*, *supra*, 21 Cal.App.4th 347, 354-355; *Cooper v. Kizer*, *supra*, 230 Cal.App.3d 1291, 1300 [" ' " 'It is not contemplated by the code provision that there should be a trial de novo before the court reviewing the administrative agency's action even under the independent review test.' [Citations.] Public policy requires a litigant to produce all existing evidence on his behalf at the administrative hearing . . . ." ' "].)

Mouton next argues that the officer's "Narrative Supplemental" report is disqualified from constituting substantial evidence in that it is "untrustworthy," because at one point in the report Mouton is referred to as "she." All of the eight other pronouns and pronoun-adjectives on that page of the report are masculine, either "he" or "his." The same is true for the second and third pages of the report. The single "she" thus looks like nothing more sinister than a simple typographical error. It does not substantiate Mouton's claim that "the officer 'blindly' copied and pasted information . . . from another police report in which a female was the accused." It certainly does not establish untrustworthiness as a matter of law. In addition, the point is not properly raised here because there is nothing in the record to show that this objection was made either to the hearing officer or to the trial court. (Evid. Code, § 353, subd. (a).)

Finally, Mouton argues that "the officer did not have reasonable cause to believe that petitioner was driving a motor vehicle" while under the influence, and consequently the trial court erred in finding probable cause for his arrest. Mouton reasons that he could not have been properly arrested because one of the officer's reports shows him being arrested at 12:25 a. m., while another shows the first of the field sobriety tests being administered at 12:28 a.m. This conflict is not reflected in the officer's "Narrative Supplemental" report. Both the hearing officer and the trial court could disregard the chronological conflict, or credit the "Narrative Supplemental" report. In either event, there is substantial evidence to support the finding of probable cause. Mouton does not challenge the veracity of the officer's reported observations of Mouton's intoxication immediately after getting out of the vehicle he was driving. Nor does Mouton deny that

he did in fact fail the field sobriety tests. The evidence on these points was uncontradicted.

The judgment is affirmed.

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Richman, J.

We concur:

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Kline, P.J.

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Lambden, J.